

**A Mangaleswary a/p Ponnampalam v Giritharan a/l E
Rajaratnam**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-09–215–08
OF 2014
ROHANA YUSUF, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI
JJCA
19 JUNE 2015

C *Family Law — Protection — Interim protection order — Application to set
aside order allowed — Appeal against decision — Whether magistrate erred in
exercise of her discretion to set aside IPO — Whether proven that manner in which
magistrate exercised her discretion manifestly wrong — Whether respondent's*
D *application out of time — Whether appellant had to bear burden of proof
— Whether fit and proper case to set aside IPO — Whether there was lacuna in
law on lifespan of IPO*

E While the appellant/wife and respondent/husband were in the process of a
divorce, the appellant had applied for an interim protection order ('IPO')
against the respondent, a medical doctor, under the Domestic Violence Act
1994 ('the Act'). The appellant had alleged that she had been assaulted by the
respondent on two separate occasions. The appellant was granted the IPO to
F prevent the respondent from using domestic violence against her. The
respondent then applied to set aside the IPO. The magistrate set aside the IPO
on the grounds that it was unfair to keep the respondent waiting for the
completion of the police investigation. The magistrate was also of the view that
with the appellant and respondent now living separately the appellant could
avoid injury. The appellant appealed against the decision to set aside the IPO
G but the High Court upheld the decision of the magistrate. Hence the present
appeal wherein the appellant argued that the court was powerless to set aside an
IPO so long as the police investigation had not been completed. In the present
case the police had neither completed its investigation nor instituted any
proceedings against the respondent. As such, it was the appellant's contention
H that when neither of these two events had occurred, the magistrate's decision to
set aside the IPO was ultra vires s 4(4) of the Act. The appellant also submitted
that the magistrate had failed to take into account the respondent's failure to
file the application within 14 days after service of the IPO. By way of this
appeal the appellant sought an order that the IPO be reinstated and be left to
I the police to complete the investigation and decide whether to charge the
respondent under the Penal Code. The respondent submitted that since the
parties were now divorced and living separately, the appellant would not need
any further protection. It was therefore the respondent's contention that the
matter under appeal had become purely academic. The respondent had also

explained that the reason for his delay in filing the application to set aside the IPO was that he had mistakenly filed the application in the High Court instead of the magistrate court.

A

Held, dismissing the appeal with no order as to costs:

B

- (1) The fallacy of the appellant's argument would lie in the fact that it assumed that the IPO could only be set aside in the two circumstances falling under s 4(4) of the Act. Both s 4(4) and s 12B of the Act, which were inserted simultaneously and came into force on 20 February 2012, had to be properly understood. Section 4(4) of the Act set out the circumstances in which an IPO would cease to have effect, while s 12B of the Act provided the mechanism for the person against whom the IPO was issued to apply to set it aside. Both provisions were unrelated and should not be read in one breadth. Thus, s 12B of the Act was not subjugated to s 4(4) of the Act and there was nothing in s 12B that could be construed as prohibiting an application to be made, and for the court to make the order sought, during the pendency of a police investigation. As the IPO is a temporary order, it could not have been the intention of the Legislature that an IPO should be given a longer life span and could only be cut short by the occurrence of either of the two events set out in s 4(4) of the Act. In the face of s 12B such construction would lead to an absolute absurdity (see paras 17–19 & 43).

C

D

E

- (2) The respondent had given his reasons for the delay in filing the application to set aside the IPO, and it was entirely for the magistrate to decide whether to accept or reject the explanation. By proceeding to hear the application to its final conclusion the magistrate would have granted the respondent abridgment of time to file the application. There was no reason to interfere with the magistrate's decision. In the circumstances, there was no merit in the appellant's contention that the magistrate had erred in failing to take into account the respondent's failure to file the application within 14 days after service of the IPO (see paras 23–24).

F

G

- (3) Under s 12B of the Act the magistrate was vested with wide discretion whether to set aside an IPO. In the present case, after considering the appellant's opposition the magistrate had decided that the IPO should be set aside. From the evidence adduced it was not proven that the magistrate had erred in the exercise of her discretion. The magistrate's error in finding that the IPO was no longer needed because the appellant could avoid injury as she was living separately from the respondent was not such a manifest error as to render the whole of her judgment defective and liable to be set aside. Neither was the High Court judge wrong in affirming her decision (see paras 25–27 & 56–57).

H

I

- A (4) In the present case it would have been easier for the appellant as the complainant to find out from the police if the investigation had been completed or to at least update the court of its progress. The respondent as the target of the criminal investigation did not have the same privilege.
- B At the same time, it would be grossly unfair and oppressive to the respondent to allow the IPO to remain hanging over his head. This did not mean that the interest of the respondent should take priority over the interest of the appellant but rather that a balance should be struck between the two competing interests. Since it is settled criminal jurisprudence that he who accuses must prove the accusation, the burden
- C would be on the appellant to satisfy the court as to why the interim order should be allowed to remain. In the present case, the appellant had not provided any assurance to the magistrate that there was any basis to investigate the matter further (see paras 33–34 & 36–39).
- D (5) Whilst it was clear the O 29 of the Rules of Court 2012 did not apply to an IPO, there appeared to be a lacuna in the law as to what would happen to an IPO if it was not set aside (see para 51).

[Bahasa Malaysia summary]

- E Semasa perayu/isteri dan responden/suami dalam proses perceraian, perayu telah memohon perintah perlindungan sementara ('PPS') terhadap responden, seorang doktor perubatan, di bawah Akta Keganasan Rumah Tangga 1994 ('Akta tersebut'). Perayu telah mengatakan bahawa dia telah diserang oleh responden sebanyak dua kali. Perayu telah diberikan PPS untuk menghalang
- F responden daripada menggunakan keganasan rumah tangga terhadapnya. Responden kemudian telah memohon untuk mengetepikan PPS. Majistret telah mengetepikan PPS itu atas alasan bahawa adalah tidak adil untuk membuat responden menunggu siasatan polis itu selesai. Majistret juga berpendapat bahawa memandangkan perayu dan responden kini hidup
- G berasingan perayu boleh mengelak daripada cedera. Perayu telah merayu terhadap keputusan untuk mengetepikan PPS tetapi Mahkamah Tinggi telah mengekalkan keputusan majistret itu. Justeru rayuan ini di mana perayu berhujah bahawa mahkamah tiada kuasa untuk mengetepikan PPS itu selagi siasatan polis tidak selesai. Dalam kes ini polis tidak menyelesaikan siasatannya
- H atau memulakan apa-apa prosiding terhadap responden. Oleh itu, ia adalah hujah perayu bahawa apabila tiada mana-mana dua kejadian itu berlaku, keputusan mejistret untuk mengetepikan PPS adalah ultra vires s 4(4) Akta tersebut. Perayu juga berhujah bahawa majistret telah gagal mengambil kira kegagalan responden untuk memfailkan permohonan dalam tempoh 14 hari
- I selepas penyampaian PPS itu. Melalui rayuan ini perayu memohon perintah agar PPS dihidupkan semula dan diserahkan kepada polis untuk menyelesaikan siasatan dan memutuskan sama ada untuk mengenakan tuduhan terhadap responden di bawah Kanun Keseksaan. Responden berhujah bahawa oleh kerana pihak-pihak kini telah bercerai dan hidup

berasingan, perayu tidak perlu apa-apa perlindungan. Oleh itu hujah responden bahawa perkara yang dirayukan itu telah menjadi akademik semata-mata. Responden juga telah menjelaskan bahawa sebab kelewatannya memfailkan permohonan untuk mengetepikan PPS itu adalah bahawa dia telah tersilap memfailkan permohonan itu di Mahkamah Tinggi dan bukan di mahkamah majistret.

Diputuskan, menolak rayuan tanpa perintah untuk kos:

- (1) Anggapan yang salah berhubung hujah perayu terletak pada fakta bahawa ia mengandaikan PPS itu hanya boleh diketepikan dalam dua keadaan yang terangkum di bawah s 4(4) Akta tersebut. Kedua-dua s 4(4) dan s 12B Akta tersebut, yang dimasukkan serentak dan mula berkuat kuasa pada 20 Februari 2012, telah difahami dengan sewajarnya. Seksyen 4(4) Akta tersebut telah menyatakan keadaan di mana PPS tidak berkesan, manakala s 12B Akta tersebut memperuntukkan mekanisme untuk seseorang yang mana PPS itu dikeluarkan untuk memohon ia diketepikan. Kedua-dua peruntukan tidak berkaitan dan tidak patut dibaca bersama. Oleh itu, s 12B Akta tersebut tidak membatalkan s 4(4) Akta tersebut dan tiada apa-apa dalam s 12B yang boleh ditafsirkan sebagai menghalang permohonan dibuat, dan untuk mehkamah membuat perintah yang dipohon, sementara menunggu selesainya siasatan polis. Oleh kerana PPS adalah perintah sementara, ia bukan niat Badan Perundangan bahawa PPS patut diberikan jangka hayat lebih lama dan hanya boleh dipendekkan disebabkan kejadian salah satu daripada dua kejadian yang dinyatakan dalam s 4(4) Akta tersebut. Berdasarkan s 12B penggubalan sebegitu akan membawa kepada suatu yang mustahil sepenuhnya (lihat perenggan 17–19 & 43).
- (2) Responden telah diberikan sebabnya kerana kelewatan dalam pemfailan permohonan untuk mengetepikan PPS, dan ia adalah untuk majistret memutuskan sepenuhnya sama ada untuk menerima atau menolak penjelasan itu. Dengan meneruskan untuk mendengar permohonan itu sehingga kesimpulan muktamadnya majistret telah memberikan responden pemendekan masa untuk memfailkan permohonan. Tiada sebab untuk campur tangan dengan keputusan majistret. Dalam keadaan itu, tiada merit dalam hujah perayu bahawa majistret telah tersilap kerana gagal mengambil kira kegagalan responden untuk memfailkan permohonan dalam tempoh 14 hari selepas penyampaian PPS itu (lihat perenggan 23–24).
- (3) Di bawah s 12B Akta tersebut majistret telah memberikan budi bicara luas sama ada untuk mengetepikan PPS. Dalam kes ini, selepas mengambil kira pembangkang perayu majistret telah memutuskan bahawa PPS hendaklah diketepikan. Berdasarkan keterangan yang dikemukakan ia tidak membuktikan bahawa majistret telah terkhilaf

- A dalam menggunakan budi bicara beliau. Kekhilafan majistret dalam
mendapati PPS itu tidak lagi digunakan kerana perayu boleh mengelak
kecederaan kerana dia tinggal berasingan daripada responden bukan
kekhilafan yang besar sehingga menyebabkan keseluruhan penghakiman
beliau cacat dan patut diketepikan. Hakim Mahkamah Tinggi juga tidak
B salah dalam mengesahkan keputusan beliau (lihat perenggan 25–27 &
56–57).
- (4) Dalam kes ini ia lebih mudah untuk perayu sebagai pengadu untuk
mengetahui daripada polis jika siasatan telah selsesai atau
sekurang-kurangnya memberitahu mahkamah perkembangan terkini.
C Responden sebagai sasaran siasatan jenayah tidak mempunyai
perlindungan yang sama. Pada masa sama, ia tidak adil langsung dan
menindas responden untuk membenarkan PPS tergantung. Ini tidak
bermaksud bahawa kepentingan responden patut diberi keutamaan ke
atas kepentingan perayu tetapi agar patut wujud keseimbangan antara
D dua kepentingan yang bersaing. Oleh kerana ia adalah jurisprudens
jenayah yang tetap bahawa dia yang menuduh hendaklah membuktikan
pertuduhan, beban adalah terletak pada perayu untuk meyakinkan
mahkamah berhubung kenapa perintah sementara patut dibenarkan
E untuk kekal. Dalam kes ini, perayu tidak memberikan apa-apa jaminan
kepada majistret bahawa terdapat apa-apa asas untuk menyiasat perkara
selanjutnya (lihat perenggan 33–34 & 36–39).
- (5) Manakala ia adalah jelas A 29 Kaedah-Kaedah Mahkamah 2012 tidak
terpakai kepada PPS, ia kelihatan terdapat kelompongan dari segi
F undang-undang berkaitan apa yang akan berlaku kepada suatu PPS jika
ia diketepikan (lihat perenggan 51).]]

Notes

- G For a case on protection in general, see 7(3) *Mallal's Digest* (5th Ed, 2015) para
4791.

Cases referred to

- Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979]
2 MLJ 101; [1978] 1 MLRA 504, FC (refd)
H *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, PC (refd)
Howard v Pickford Tool Co Ltd [1951] 1 KB 417, CA (refd)

Legislation referred to

- I Domestic Violence Act 1994 ss 2, 4(1), (4), 5, 6(2), 12B
Evidence Act 1950
Penal Code ss 321, 323
Rules of Court 2012 O 1 r 2(2), O 29 r 1(2B), O 29 r 1(2BA)

YN Foo (Khiran Dhaliwal with her) (YN Foo & Partners) for the appellant. A
Awtar Kaur (KL Choy & Co) for the respondent.
Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) watching brief.
Honey Tan watching brief for Malaysian Bar.
Meera Samanther (Quah Su Enn with her) watching brief for Association of Women Lawyers, Women's Aid Organisation, Women's Centre For Change (Penang), All Women's Action Society, Persatuan Kesedaran Komuniti Selangor and Sisters in Islam. B

Abdul Rahman Sebli JCA: C

THE APPEAL

[1] This appeal is against the decision of the Ipoh High Court upholding the decision of the learned magistrate setting aside the Interim protection order ('the IPO') granted to the appellant on 5 September 2012. The appellant is now asking for an order that the IPO be reinstated and the matter be left to the police to complete the investigation and a decision made by the public prosecutor whether to charge the respondent for voluntarily causing hurt to the appellant, an offence under s 321 and punishable under s 323 of the Penal Code. D E

[2] The IPO was granted following a police report lodged by the appellant against the respondent, a medical doctor, alleging assault at 11.30pm on 29 August 2012 and at 8am on 30 August 2012. Amongst others, she alleged that the respondent shouted at her, hit her with his shoes and threatened to beat her up if she dared to go against him. F

DOMESTIC VIOLENCE

[3] Section 2 of the Domestic Violence Act 1994 ('the DVA') defines 'domestic violence' to mean the commission by a person, whether by himself or through a third party, of one or more of the following acts against his or her spouse, his or her former spouse, a child, an incapacitated adult, or any member of the family: G H

- (a) wilfully or knowingly placing, or attempting to place, the victim in fear of physical injury;
- (b) causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury; I

- A (c) compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain;
- (d) confining or detaining the victim against the victim's will;
- B (e) causing mischief or destruction or damage to property with the intent to cause or knowing that it is likely to cause distress or annoyance to the victim;
- (f) causing psychological abuse which includes emotional injury to the victim;
- C (g) causing the victim to suffer delusions by using any intoxicating substance or any substance without the victim's consent or if consent is given, the consent was unlawfully obtained; or
- (h) in the case where the victim is a child, causing the victim to suffer delusions by using any intoxicating substance or any other substance.
- D

- [4] Thus domestic violence is violence, physical or psychological, against any member of the family and is not confined to husband and wife. At the hearing of this appeal on 14 May 2015, the respondent was present but the appellant was not as according to learned counsel, she was and still is traumatised by the incident. Learned counsel requested that the appeal be heard in her absence. The respondent had no objection. So we proceeded to hear the appeal in the absence of the appellant. Having heard arguments, we reserved judgment as we needed time to consider the issues raised by the parties. We have now reached a unanimous decision and this is our judgment.
- E
- F

THE BACKGROUND FACTS

- [5] The material facts relevant to the issues are these. The appellant and the respondent were in the process of a divorce and living together at their matrimonial home at the time the IPO was issued but were already divorced at the time this appeal came up for hearing. A decree nisi was ordered by the High Court on 26 November 2014 and made absolute on 26 February 2015.
- G

- [6] We were told by learned counsel for the respondent that the learned judicial commissioner who heard the divorce petition found the appellant to be 60% responsible for the breakdown of the marriage. Following the divorce, the appellant vacated the matrimonial home on 25 March 2015 and has since been living separately from the respondent.
- H

- I WHETHER APPEAL ACADEMIC

[7] It was argued that since the parties are now divorced and living separately, the appellant does not need further protection and the DVA does not apply any more. It was urged upon us not to waste our time hearing the appeal as the matter has become purely academic. Nevertheless we proceeded to hear full argument from both sides.

A

[8] We have also allowed, upon request, counsel holding watching brief for the Malaysian Bar and counsel watching brief for several NGOs for women including Sisters in Islam to address the court. It is a healthy display of women solidarity we must say. The attorney general also held a watching brief and was represented by a deputy public prosecutor.

B

C

[9] The record shows that at the case management, the deputy public prosecutor was directed by the deputy registrar to file an affidavit to confirm certain material facts pertaining to this appeal but apparently this was not done. We therefore do not have the benefit of the deputy public prosecutor's assistance in confirming the actual status of the police investigation against the respondent.

D

[10] The principle is that the Court of Appeal should not be used to answer academic questions: See *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 cited with approval by the Federal Court in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101; [1978] 1 MLRA 504. The IPO that was granted to the appellant was issued pursuant to s 4(1) of the DVA which stipulates as follows:

E

F

The Court may, during the pendency of investigations relating to the commission of an offence involving domestic violence, issue an interim protection order prohibiting the person against whom the order is made from using domestic violence against his or her spouse or former spouse or a child or an incapacitated adult or any other member of the family, as the case may be, as specified in the order.

G

[11] The word 'court' in this provision refers to the magistrates court, being the court having jurisdiction to try the actual offence alleged against the perpetrator of the domestic violence (see s 2). This is of course on the assumption that the police have classified the report under s 321 of the Penal Code.

H

[12] There is no ambiguity in s 4(1). It empowers the court to issue an IPO against either the husband or the wife to prevent him or her from using domestic violence against his or her spouse or his or her former spouse or a child or an incapacitated adult or any other member of the family.

I

- A** [13] Given the clear ambit of s 4(1), which includes a ‘former spouse’, it is incorrect to say that the IPO only subsists in a subsisting marriage. An IPO can still be in force even where the parties are divorced and living separately. We therefore reject the respondent’s argument that since the marriage between the appellant and the respondent had come to an end, this appeal has become academic.
- B**

WHETHER MAGISTRATE CAN SET ASIDE IPO

- C** [14] We take note of the fact that an IPO, as the term implies, is a temporary order which by virtue of s 4(4) automatically ceases to have effect in either of the following two circumstances, that is to say:
- (a) upon completion of the investigation; or
- (b) when a criminal proceeding relating to the commission of an offence involving domestic violence is instituted against the person against whom the order is made.
- D**

- E** [15] It was contended by learned counsel for the appellant that since neither of these two events had occurred, the learned magistrate’s decision to set aside the IPO was ultra vires s 4(4) of the DVA. What learned counsel is saying in effect is that so long as the police investigation has not been completed and neither has any criminal proceedings been instituted against the respondent, the IPO remains in force and the court is powerless to set it aside.

- F** [16] Learned counsel for the respondent contended otherwise. It was submitted that the learned magistrate had full authority to set aside the IPO as s 12B of the DVA empowered her to do so. Section 12B provides as follows:

- G** 12B The person against whom an interim protection order is made may apply to set aside the order within fourteen days from the date the order is served.

- H** [17] We are inclined to agree with the respondent. The fallacy of the appellant’s argument lies in the fact that it assumes that only in the two circumstances falling under s 4(4) could an IPO be set aside. Both s 4(4) and s 12B it will be noted are relatively new provisions having been inserted simultaneously vide Act A1414 which came into force on 20 February 2012.

- I** [18] The purpose behind these two provisions must be properly understood. Subsection 4(4) sets out the circumstances in which an IPO ceases to have effect. Section 12B on the other hand provides the mechanism for the person against whom an IPO was issued to apply, within 14 days of the service of the order, to set it aside.

- [19] These two provisions are unrelated and must not be read in one

breadth. Section 12B stands on its own and is not subjugated to sub-s 4(4). There is nothing in s 12B that can be construed as prohibiting an application to be made, and for the court to make the order sought, during the pendency of a police investigation. In fact the application can be made immediately upon service of the IPO. To accede to the construction advocated by learned counsel for the appellant would be to render the provisions of s 12B completely otiose. That cannot be the result intended by Parliament when it enacted the provision.

A

B

THE QUESTION FOR DETERMINATION

C

[20] On the facts of the present case, we are of the view that the question is not whether the learned magistrate had power to set aside the IPO but whether this was a fit and proper case for the court to make such order and this includes the preliminary question of whether the application should be struck out in limine for being filed out of time.

D

WHETHER THE RESPONDENT'S APPLICATION OUT OF TIME

[21] We shall first deal with the issue of time lapse. There is no dispute that the IPO was served on the respondent on 24 September 2012 but the application to set aside was only made on 11 December 2012. The respondent was therefore two months and 18 days out of time. He had however given his explanation for the delay and his explanation was that he had wrongly filed the application in the High Court instead of the magistrates court (see para 17 of his affidavit in support affirmed on 5 November 2012).

E

F

[22] The appellant does not deny that this was the reason for the delay but pointed out that the respondent's application to the magistrates court after the botched High Court application was still out of time and no application for extension of time was applied for nor granted by the court. It was submitted that the delay was fatal and the application for setting aside should have been dismissed outright by the learned magistrate without hearing the merits of the application.

G

H

[23] We cannot subscribe to learned counsel's proposition. We do however agree with her that an explanation must be given for the delay and an application for extension of time must be made by the respondent. But the fact is the respondent had already done that, ie explaining the delay, and this was done by way of an affidavit and the learned magistrate accepted his explanation. It was entirely for the learned magistrate to decide whether to accept or to reject the explanation and we have no reason to interfere with that decision.

I

- A [24] Clearly therefore it was not wrong for the learned magistrate to entertain the application although it was filed out of time. In any event the respondent had, by para 1 of the notice of application, prayed for an order that he be granted leave to file the application. By proceeding to hear the application to its final conclusion, the learned magistrate must have granted the respondent
- B abridgement of time to file the application. In the circumstances we see no merit in the appellant's contention that the learned magistrate had erred in failing to take into account the respondent's failure to file the application within 14 days after service of the IPO.

C WHETHER PROPER CASE FOR SETTING ASIDE

- D [25] Now the merits of the matter. In an application to set aside an IPO under s 12B of the DVA, a magistrate is vested with wide discretion whether to allow or to disallow the application. The only fetter to the discretion is that it must be exercised judiciously and based on the material before the court. In the present case the respondent's application was supported by his affidavit in which he averred, amongst others, to the following facts:

- E (a) that the police report lodged by the appellant was false and was lodged for the purpose of evicting him from the matrimonial home and to prop up her claim for the entire matrimonial property in the divorce petition filed by the respondent;
- F (b) the IPO obtained by the appellant was intended to shame him;
- (c) that the appellant is a cruel woman and had a violent temper; and
- (d) that the appellant had on several occasions threatened to injure him.

- G [26] These averments of fact were traversed by the appellant in her affidavit in opposition but it is not clear from the grounds of judgment if any of those grounds found favour with the learned magistrate. What is clear however is that she gave two reasons for setting aside the IPO, firstly it was unfair to keep the respondent waiting for the completion of the police investigation and secondly
- H the appellant could avoid injury as she was living separately from the respondent.

- I [27] There can be no hard and fast rule as to what in law amounts to a valid reason in an application for setting aside under s 12B but we must say at the outset that the second reason given by the learned magistrate cannot be a valid reason and is irrelevant in considering whether the IPO should be set aside. We say so simply because a person can still commit an act of domestic violence against his or her former spouse even after divorce. This is not something that

is unusual in our society or any society for that matter. Parliament in its wisdom must have taken this into contemplation when enacting s 4(1) by including within its ambit a 'former spouse'.

A

[28] As for the first reason given by the learned magistrate, she noted that as of the date of hearing, there was still no news of the outcome of the police investigation. This prompted her to make the following remarks:

B

Adalah tidak adil kepada suami menunggu dan terus menunggu dengan IPO terbeban dibahunya. Mahkamah berpendapat, penyiasatan kes dibawah Sek.323 KK tidak perlu mengambil masa yang lama sekiranya laporan polis yang dibuat oleh pemohon adalah sesuatu yang benar dan tidak diada-adakan. Laporan perubatan sepatutnya dapat diperolehi dalam tempoh 1 bulan dari tarikh pemohon ke hospital/klinik untuk mendapatkan rawatan bagi kecederaan yang dialami seperti yang didakwa dalam laporan polis tersebut.

C

[29] It was contended that the learned magistrate had fallen into error in placing on the appellant the burden of producing the medical report and of ensuring that the police investigation was completed. It was pointed out that since the police investigation and its progress were not within the purview of the appellant, it was wrong to take away the IPO due to no fault of hers.

D

E

[30] There is force to the argument but in our view the matter must also be looked at from the respondent's perspective. If the police investigation and its progress were not within the purview of the appellant, neither were they within the purview of the respondent. As between the two competing interests, we would think that it is the respondent rather than the appellant who will be adversely affected by the delay in the police investigation. It will be unfair in the circumstances to allow the appellant to benefit from the delay.

F

[31] An IPO by its very nature carries with it a stigma that the person against whom the order is made is a violent person although the truth or otherwise of the police report leading to its issuance has yet to be established. The present case is a good example of how an IPO can cause in justice to the person against whom it is issued. The police report was lodged by the appellant on 30 August 2012. Yet eight months later when the case came up for hearing before the learned magistrate on 30 April 2013, there was still no news of the outcome of the police investigation.

G

H

[32] In fact it had not been shown to the learned magistrate nor to the learned High Court judge that the police had in fact carried out any investigation into the report and if so what was the stage of the investigation. Before us learned counsel for the appellant could only come up with a bare statement from the bar table that there is 'no evidence' that the police investigation has been completed.

I

A [33] We fail to understand why it was so difficult for the appellant to find out from the police if the investigation had been completed or to at least update the court of its progress. As the complainant, she had every right to obtain such information, more so when the information was required for the purpose of the present proceedings, unless she took the position that it was not in her interest to obtain such information. The respondent does not have the same privilege, being the target of the criminal investigation and a potential accused.

C [34] Having given anxious consideration to the matter, we are of the view that it is grossly unfair and oppressive to the respondent to allow the IPO to continue hanging over his head like the sword of democles without knowing when it would be lifted. Having regard to the ordinary course of human affairs, it is fair to assume that the respondent has been made to suffer the indignity of being labelled a violent man although there is, as yet, no criminal charge filed against him for the assault allegedly committed in August 2012.

E [35] The present appeal proceeded on the basis that the investigation has not been completed, and we are now into the second half of 2015. How much longer, one may ask, will the police take to complete the investigation, if at all any investigation has been carried out? We agree with the learned magistrate's observation that an investigation into an offence punishable under s 323 of the Penal Code should not take such a long time to complete if the police report lodged by the appellant contained the truth.

F BURDEN OF PROOF

G [36] The appellant had posed the question, who bears the burden of proof in a proceeding under s 12B of the DVA? Apart from the relevant provisions on burden of proof in Chapter VII of the Evidence Act 1950, there are two things in particular that we need to keep in mind when considering this question, first the temporary nature of the order and second that the IPO relates to an allegation of criminal conduct by the appellant. It is settled criminal jurisprudence that he who accuses must prove the accusation.

H [37] In saying this we are of course not suggesting that the interest of the respondent takes priority over the interest of the appellant. Obviously a balance has to be struck between the two competing interests. All things said and done and having regard to the fact that the IPO was issued pursuant to an allegation of a criminal conduct by the respondent, and that the respondent had no access to the police investigation to provide proof that the police investigation had been completed within the meaning of s 4(4), we take the view that the burden is on the appellant to satisfy the court why the interim order should be allowed to remain.

[38] In the present case, neither the medical report nor the affidavit of the medical officer was produced by the appellant to at least give some form of assurance to the learned magistrate that there was basis to investigate the matter further. The affidavit of the investigating officer could also have been produced by the appellant, not to prove the alleged offence, but for the limited purpose of confirming whether the investigation had been completed and if so whether any recommendation had been made to the public prosecutor whether to charge or not to charge the respondent with any offence in connection with the report.

A

B

[39] If even that was not possible, the appellant herself could still affirm to those facts in her affidavit after consulting the police. But none of these was done, and the appellant expects the court to assume that the investigation has not been completed.

C

WHETHER INTEGRITY OF POLICE INVESTIGATION COMPROMISED

D

[40] There is evidence that the appellant on her own initiative went to Hospital Raja Permaisuri Bainun, Ipoh to seek treatment four days after lodging the police report and five days after the alleged assault. It has not been explained why the appellant had gone to the hospital by herself and not accompanied by any police officer, given that her police report contained an allegation of a criminal act against the respondent.

E

[41] We believe the standard operating procedure would be for the police to send a complainant in a physical assault case to the hospital for medical examination and not for the complainant to do so on her own without being accompanied by any police officer.

F

[42] The reason for this is obvious. A police investigation must not only be independent but must be seen to be independent. The independence and integrity of the investigation will be compromised if a complainant is allowed to gather evidence by herself. In an assault case involving an allegation of physical injury, a medical report prepared by an independent medical officer is crucial evidence to determine if the complainant has indeed suffered any injury, if so how serious is the injury, on which part of the body was the injury inflicted and so on and so forth.

G

H

LIFESPAN OF IPO

I

[43] As we said, an IPO is a temporary order. It is not meant to be permanent. Even a protection order issued pursuant to s 5 has a lifespan of only 12 months unless further extended which period shall not exceed 12 months:

- A See s 6(2). It cannot be the intention of the legislature that an IPO should be given a longer lifespan and that it could only be cut short by the occurrence of either of the two events set out in s 4(4). In the face of s 12B such construction will lead to an absolute absurdity.
- B [44] Learned counsel for the appellant argued that there is no harm in allowing the IPO to remain in force as it merely restrains the respondent from further abusing the appellant and that it in no way deprives him of his rights or interest in the matrimonial home. With due respect, we do not see the relevance of this factor in considering whether the IPO should be set aside or otherwise.
- C
- D [45] In any event, even without the protection accorded by the IPO, there are other laws that can provide adequate protection to the appellant. One such law is the Penal Code itself. Surely it will be a criminal offence under the Penal Code if the respondent were to commit any violent act or threat of violence against the appellant. If that were to happen, the appellant is at liberty to lodge a fresh police report against the respondent. Not all is lost merely because no IPO is in place. The sad reality is that if a person is violent by nature, he will still commit domestic violence irregardless, with or without an IPO.
- E

WHETHER PROPER PARTIES BEFORE THE COURT

- F [46] Learned counsel for the appellant posed the questions: Who are the proper parties to an application to set aside an IPO? Ought the application be served on the police, the public prosecutor and the social welfare officer? Should they be made parties? The DVA unfortunately is silent on the procedure with regard to these matters.
- G [47] In our view, since a proceeding under s 12B is strictly a private matter between two private individuals in a domestic dispute, there is no necessity to name and bring in as parties those others mentioned by learned counsel, even if it is only to give the other side notice of the application. But if any other party wishes to take part in the proceedings, it is up to the party concerned to apply for a joinder. We do not think it is the duty of the applicant to do so. All that he is interested in is to have the order set aside.
- H
- I [48] It is true that in the present case the application for the IPO was made by the social welfare officer but it was done on the appellant's instruction and on her behalf and for her benefit. If at all the social welfare officer must be made a party, it is for such officer to apply to be joined as a party.

WHETHER IPO APPLICATION TO BE HEARD INTER PARTES

A

[49] The respondent on his part raised the point that the appellant should have applied for the hearing in the magistrates court to be made inter partes and that her failure to do so had prejudiced him in that he was given no opportunity to ventilate his case before the IPO was extended beyond 21 days. It was submitted that since an IPO is a form of interim injunction obtained by way of an ex parte application, O 29(2B) and O 29(2BA) of the Rules of Court 2012 ('the Rules') would take effect. We reproduce below O 29(2B) and O 29(2BA):

B

Order 29(2B)

C

Unless earlier revoked or set aside, an interim injunction obtained on ex parte application shall automatically lapse twenty one days from the date it was granted.

D

Order 29(2BA)

An ex parte injunction must be served within seven days of the date of the order, and the Court granting the order must fix a date to hear the application inter partes within fourteen days from the date of the order.

E

[50] There are no equivalent provisions in the DVA but O 1 r 2(2) of the Rules expressly provides as follows:

These Rules do not have effect in relation to proceedings in respect of which rules have been made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

F

[51] In the light of this provision, we agree with learned counsel for the appellant that O 29 of the Rules has no application. The procedure has been prescribed by the DVA itself, s 4(1) for the grant of the IPO and s 12B for the setting aside of the order. Whilst we agree that O 29 of the Rules does not apply, there appears to be a lacuna in the law as to what happens to an IPO if it is not set aside.

G

[52] There is no provision in the DVA to prescribe its lifespan unlike O 29(2B) of the Rules which stipulates that an interim injunction order obtained on ex parte application automatically lapses 21 days from the date it was granted unless earlier revoked or set aside.

H

[53] An IPO once issued must be served personally on the person named in the order and will only take effect upon proper service. Once served the person against whom the order is issued can then apply to set it aside within 14 days of service. To our mind this procedure provides effective safeguard against abuse of s 4(1). For all practical purposes it is similar to the safeguard provided by

I

A O 29(2BA) of the Rules except that it is for the person against whom the order is issued to make the application to set it aside.

B [54] Since the safeguard is already in place, we do not see how the appellant's failure to apply for the hearing in the magistrates court to be made inter partes had prejudiced the respondent. The truth of the matter is, after being served with the IPO the respondent applied to have the order set aside and in fact succeeded both in the magistrates court and in the High Court. Thus no prejudice whatsoever had been occasioned by the appellant's failure to apply for the hearing to be made inter partes. The point raised by the respondent is therefore without substance.

WHETHER THE APPELLANT TO PAY COSTS IN THE HIGH COURT

D [55] Lastly, counsel for the appellant questioned why costs in the sum of RM600 should be awarded against the appellant by the High Court after dismissing her appeal. Again this is a matter of discretion and we shall say no more.

E SUMMATION AND CONCLUSION

F [56] To recapitulate, the law allows for an IPO to be set aside on application and in this case the learned magistrate after considering the respondent's application and the appellant's opposition thereto decided that the IPO should be set aside. It is not for us sitting in our appellate jurisdiction to differ from the learned magistrate unless it can be shown that the way in which she exercised the discretion was manifestly wrong: *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC).

G [57] We are not convinced that the learned magistrate had erred in the exercise of her discretion. Her error in finding that the IPO was no longer needed because the appellant could avoid injury as she was living separately from the respondent is not such a manifest error as to render the whole of her judgment defective and liable to be set aside. Nor do we think the learned High Court judge was wrong in affirming her decision.

H [58] For all the reasons aforesaid, we are unanimous in finding that there is no merit in the appellant's appeal. Accordingly the appeal is dismissed with costs. We shall now proceed to hear the parties on costs.

I Note: After hearing arguments, we make no order as to costs.

Appeal dismissed with no order as to costs.

A

Reported by Kohila Nesan

B

C

D

E

F

G

H

I